FILED
APR 27 1981

No. 80-1606

In The

Supreme Court of the United States

October Term, 1980

PRICE ENTERPRISES, INC., et al.,
Petitioners,

v.

AMERICAN INTERNATIONAL PICTURES, INC., et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

The question for review stated by Petitioners is not now and never has been an issue in this case. While the admissibility of evidence pursuant to Rule 803(6), Federal Rules of Evidence, was indeed an issue below, the evidence does not support the statement that the documents admitted were prepared in anticipation of litigation or that they were admitted without provision for cross-examination.

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Respondents American International Pictures, Inc., Avco Embassy Pictures, Inc., Buena Vista Distribution Co., Inc., Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Distributing Corporation, collectively referred to as the Distributors, oppose the issuance of a writ of certiorari to the United States Court of Appeals to review its opinion in this case. That opinion is now reported at 636 F.2d 933 (4th Cir. 1980).

I.
STATEMENT OF THE CASE

A. The Checkers And Their Supervisors Testified At Length

We disagree with Petitioners' statement of the case as to the documents admitted by the trial court pursuant to Rule 803(6), Federal Rules of Evidence. We therefore restate the evidence relating to the admissibility of those documents. Record references are to the Appendix in the United States Court of Appeals for the Fourth Circuit.

One reading the Statement of the Case prepared by Petitioners gains the impression that the trial court permitted introduction of reports of theatre owners' box office receipts prepared by independently employed checkers without any testimony by the checkers themselves as to how they made their checks or by the custodians of the reports as to how they were prepared. That is directly contrary to what actually happened.

The checks to verify the theatre owners' report of box office receipts were performed by 113 checkers employed by six different checking firms. At the final pretrial conference the Distributors offered to call all 113 checkers and representatives of all the checking firms to authenticate the documents and to describe how each individual check was made. However, upon the Distributors' argument that the reports were admissible pursuant to Rule 803(6) the trial court ruled that the reports would be admissible if the Distributors followed the very stringent authentication requirements set out in the trial court's order of September 20, 1979, reproduced at pages 7a-10a of the Petition.

Pursuant to that order, the Distributors called six of the checkers to testify about their instructions and how they conducted their checks (Blackwood, App. 375-399; Kettring, App. 399-414; Rogers, App. 414-444; Hamilton, App.

444-470; Deuso, App. 472-478; Kord, App. 634-638). Those six witnesses were examined on direct examination for approximately forty-one pages of trial transcript and on cross-examination for approximately seventy-two pages of transcript.

Five supervisors of the checkers were also called at trial to authenticate the reports and to outline the procedures they followed (Roth, App. 177-236; Rosenblith, App. 237-271; Perakos, App. 272-314; Smith, App. 315-349; Wardlow, App. 350-374). Another supervisor's deposition was taken and read at trial (Bernstein, App. 2070-2095). With the exception of one brief introductory witness the first 521 pages of a trial transcript which ultimately consisted of 2574 pages of testimony contain the direct and cross-examination of the very witnesses whom Petitioners contend they were denied the opportunity to cross-examine at trial.

To put it another way, the presentation of the Distributors' evidence at trial took five courtroom days. Two of those days—nearly 40% of the Distributors' evidence—were devoted to examination and cross-examination of the checkers and their supervisors.

The trial court's order also required the Distributors to produce the names and addresses of all the checkers and directed the Distributors not to interfere with any attempts the Petitioners made to interview the checkers. The order permitted Petitioners to call any checkers they wished to impeach the reliability of their reports. They did not call a single checker witness out of the more than one hundred identified to them.

B. The Checks Were Not Prepared For The Purposes Of Litigation

There is no evidence in the record that those conducting the checks knew that they might be used in litigation. In-

deed, the contrary is true. The checkers were not told the purposes for which the checks were being made (App. 243-244; 288; 359; 422; 2094).

II.
REASONS FOR DENYING THE PETITION

Petitioners attempt to raise a question relating to the weight a jury should give to certain evidence to the level of a denial of the long revered right of cross-examination. Petitioners' attempt fails because it is directly contradicted by the record and because Rule 803(6), Federal Rules of Evidence, merely is an extension of the long-standing and well recognized admissibility of business records into evidence without calling each one of the persons who made the entry to testify about it.

The admissibility of checking reports in motion picture underreporting cases as business records is not a matter of first impression. The leading case addressing the issue is *L.C.L. Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F.Supp. 1090 (N.D. Tex. 1976), aff'd in part, rev'd in part, 566 F.2d 494 (5th Cir. 1978). In that case 146 blind checks were conducted on eight theatres. Of the 146 blind checks, 79 revealed substantial discrepancies between the checkers' reports and the exhibitor's box office report. The reports were authenticated by supervisors of the checking companies. *L.C.L. Theatres* Trial Transcript 1622-23.

The exhibitor in *L.C.L. Theatres* sought to discredit the trustworthiness of the reports by "pointing to a lack of training of the checkers, the presence of nonpaying employees in the theaters to be counted and the incentive of the checkers to exaggerate their reports in the belief that their employees wanted a large box office" and other alleged biases. 421 F.Supp. at 1094. Those contentions were flatly rejected by the court. Judge Higginbotham observed:

> The fact is that the checkers used were hired not by Sargoy, but by companies such as the Retail Credit Association. Moreover, no credible explanation was offered for the consistent absence in reported box office receipts of differences between the open checkers' reports and the theaters' box office receipts with equally consistent differences between the reports of blind checks and box office reports.

As to the exhibitor expert's testimony that the blind checks contained an unacceptable risk of error, Judge Higginbotham remarked:

> Although there is doubtlessly a margin within which a "checker" will err, common sense tells us that despite all of the "expert" testimony and the claims of Bubis as to the difficulty of a checker's work and the training a checker should have, we are talking about the counting of cars and the counting of people in theaters hardly of the large metropolitan variety.

In a variety of other cases the courts have uniformly held that under Rule 803(6) the authenticator of the record at trial need not have firsthand knowledge of the events recorded. *See, e.g., United States* v. *Reese,* 568 F.2d 1246, 1252 (6th Cir. 1977) (articles prepared and placed in scrapbook by hospital employee admitted through testimony of hospital medical records administrator who had no personal knowledge of the evidence contained in the record); *United States* v. *Pfeiffer,* 539 F.2d 668, 671 (8th Cir. 1976) (observing that "[I]t has long been held that the absence of the person who prepared the exhibit goes to the weight to be given the evidence and not its admissibility," the court held that delivery invoices prepared by other companies were admissible through Goodyear traffic manager).

The weight accorded to such records is within the domain of the trier of fact. *United States* v. *Evans,* 572 F.2d 455, 490 (5th Cir. 1978), *cert. denied,* 439 U.S. 870 (1978) (objections relating to identity or competency of the actual preparer may be relevant to their evidentiary weight but does not effect admissibility). See *Crompton-Richmond Co.* v. *Briggs,* 560 F.2d 1195, 1202 n. 12 (5th Cir. 1977); *Johnson* v. *United States,* 325 F.2d 709, 711 (1st Cir. 1963). The trial court correctly charged the jury as to the weight to be given the records (trial transcript, p. 2547).

By its very terms Rule 803(6) permits the introduction of any business records unless the circumstances of preparation indicate a lack of trustworthiness. Petitioners contend that the records at issue here lack trustworthiness, because they were prepared in anticipation of litigation. Petitioners cite no appendix references to support that assertion. We have set out above the appendix references showing that neither the checkers nor their supervisors knew the purposes for which the records were being made.

As the evidence at trial showed, checks of this kind are constantly being made nationwide. Few of those checks ever get to litigation. As one witness put it, it was simply a survey of motion picture attendance (App. 2094). Thus, any suspicion that the records may not be trustworthy because they may be used in litigation fails because the individuals preparing them, having no knowledge of the proof to which they might be put, have no reason not to be accurate.

Furthermore, the test of admissibility is the function served by the records. The checking supervisors all testified that it was a regular, indeed essential, part of their business to prepare checking reports of the kinds challenged here. In *United States* v. *Baxter,* 492 F.2d 150 (9th Cir. 1973),

cert. den. 416 U.S. 940 (1974), the court admitted records kept by an informant in a criminal matter after he had agreed to cooperate with the United States. The court said, at p. 165:

> "It is true that business records prepared specifically to assist in litigation are unreliable, because they are likely to be self-serving in a way that cannot be scrutinized by cross-examination at trial. However, the test is not the motivation of the employee preparing the record, but the function served by the records in the operation itself. There is no doubt that the Hernandezes continued to depend upon the notebooks, even after the date Wright agreed to cooperate with the Government. The entries made after that date were still prepared in the regular course of business of the Hernandez enterprise."

If such records are admissible in a criminal trial, even though the informant specifically knows they will be used in litigation, then surely records kept in the ordinary course of business by those who have no idea to what use they might be put are admissible in a civil trial.

Although the court below did not specifically mention this Court's opinion in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), the result it reached is entirely consistent with that opinion. There a statement made by a deceased witness to an extraordinary event, a railroad crossing accident, was denied admissibility on the ground that it did not constitute a business record. As the trial court pointed out in its ruling reproduced at page 9a of the Petition, *Palmer* involved a unique statement concerning a unique occurrence, not records routinely prepared over a course of years. *Palmer* offers no reason to review the opinion of the Fourth Circuit.

III.
CONCLUSION

The evidence in this case shows clearly that the trial court carefully provided for proper authentication of all records introduced at trial and carefully instructed the jury on the weight they could give them. Rule 803(6) requires no more. The Petition should be denied.

Respectfully submitted

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